

SUPREME JUDICIAL COURT  
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

NO. 09268

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NATHANIEL LAVALLEE, et al.

V.

THE JUSTICES OF THE HAMPDEN SUPERIOR COURT, et al.

MICHAEL CARABELLO, et al.

V.

THE JUSTICES OF THE HOLYOKE DISTRICT COURT

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ON RESERVATION AND REPORT FROM THE  
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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John Reinstein  
BBO #416120

William J. Leahy  
BBO #290140

ACLU of Massachusetts  
99 Chauncey Street  
Suite 310  
Boston, MA 02111  
(617) 482-3170

Andrew Silverman  
BBO #462700

Patricia A. Wynn  
BBO #542523

William C. Newman  
BBO #370760

Benjamin H. Keehn  
BBO #542006

ACLU of Massachusetts  
39 Main Street  
Northampton, MA 01060  
(413) 584-7331

COMMITTEE FOR PUBLIC COUNSEL SERVICES  
44 Bromfield Street  
Boston, MA 02108  
(617) 482-6212

David P. Hoose  
BBO #239400  
KATZ, SASSON, HOOSE & TURNBULL  
1145 Main Street  
Suite 304  
Springfield, MA 01103  
(413) 732-1939

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ISSUES PRESENTED

1. Whether this Court should exercise its powers of general superintendence under G.L. c.211, §3, where petitioners assert that the Commonwealth's assigned counsel compensation rates, which have been permitted to stagnate since 1986, are unconstitutional as applied, in that the inadequacy of those rates has resulted in the abrogation of petitioners' right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights.

2. Whether this Court should grant preliminary relief to petitioners in the form of an order authorizing counsel assigned to represent indigent defendants in Hampden County who would otherwise be left unrepresented to be compensated on an interim basis at a higher rate than what the Legislature has enacted, where the injury to petitioners from the annulment of their right to the assistance of counsel is immediate and irreparable, and where petitioners have a strong likelihood of success on the merits.

3. Whether, in order to restore the fundamental right of indigent criminal defendants to access to justice in the courts of Hampden County, this Court should use its inherent authority to direct expenditures essential for that purpose.

STATEMENT OF THE CASES

These consolidated cases are before the Court on reservation and report by a single justice (Spina, J.) of petitions for relief pursuant to G.L. c.211, §3, filed on behalf of indigent individuals who have been charged with criminal offenses in Hampden County and who have not been provided with counsel even though each is constitutionally entitled to be represented by an attorney.

On May 6, 2004, the Committee for Public Counsel Services (CPCS) filed a petition pursuant to G.L. c.211, §3, on behalf of Nathaniel Lavallee and eighteen other indigent individuals<sup>1/</sup> charged with criminal offenses and held without counsel by the Springfield District Court (R. 18, 27-31 [Lavallee et al. v. The Justices of the Springfield District Court, SJ-2004-0198] [Lavallee]).<sup>2/</sup>

On May 6, 2004, the American Civil Liberties Union of

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<sup>1/</sup>Cordelle Simmonds, Issac Verdejo, Jamar T. Gillerson, Arnold Freeman, Harold Vargas, Reginald C. Smith, Corey L. Smith, Debra Staples, Charles Foley, Douglas Lewis, Keith E. Taskey, Dana J. Jones, Angel Rivera. Joseph Polamtier, Maria Alvarado, Jonathan Marrero, Omar Hall, and Luis A. Osorio.

<sup>2/</sup>The record appendix is cited by page number as "(R. )." The order of the single justice designating the record on appeal (R. 1167-1169) was amended on June 3, 2004, to include the affidavit of CPCS Chief Counsel William J. Leahy, dated May 28, 2004, and its attachments (R. 325-334, 335-586). The order was further amended on June 10, 2004, to include the affidavit of Matthew J. Gorzkowicz, dated June 9, 2004, and its attachments. The Gorzkowicz affidavit was docketed after petitioners had completed assembling and reproducing the record appendix, and is to be submitted to this Court with respondents' brief.

Massachusetts filed a petition pursuant to G.L. c.211, §3, on behalf of Michael Carabello and four other indigent individuals<sup>3/</sup> charged with crimes and held without counsel by the Holyoke District Court (R. 24, 628-633 [Carabello et al. v. The Justices of the Holyoke District Court, SJ-2004-0199] [Carabello]). The petitions were filed after judges in the Springfield and Holyoke District Courts had denied petitioners' motions to compensate assigned counsel at a rate greater than the rate -- \$30 per hour for a District Court case or \$39 per hour for a Superior Court case -- that the Legislature has authorized CPCS to pay to assigned counsel (R. 52 at ¶9 [Aff. of Andrew Silverman, 5/5/04], 81, 254, 639, 724, 803, 874, 953).<sup>4/</sup> The petitions alleged that as a result of the Commonwealth's chronic underfunding of the assigned counsel system administered by CPCS, there was no longer a sufficient

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<sup>3/</sup>Alberto Rivera, Joel Rodriguez, David Vaddy, and Luis Vallellanas.

<sup>4/</sup>In Lavallee, after a hearing held in Springfield District Court on May 5, 2004, Judge Payne denied petitioners' "Motion[s] to Assign Certified Private Counsel" (requesting the assignment of counsel at a rate of compensation greater than that authorized by the Legislature) on the grounds that, "under the ... provisions of [G.L. c.211D] and under the [rules of the Supreme Judicial Court, where] there are no ... competent attorneys willing or able to be appointed, then the appointment rests [solely] on the shoulders of CPCS" (R. 272). In Carabello, after a hearing held in Holyoke District Court on May 5, 2004, Judge Gordon denied petitioners' motions for the appointment of counsel at a rate of \$90 per hour (the CPCS-approved rate for Superior Court cases), after concluding in written findings that he had "no authority to order any increase in the level of compensation for appointed counsel" (R. 636, 715, 873, 950).

number of certified bar advocate attorneys available to accept assignment in petitioners' cases (R. 28, 629-630). The petitions requested a ruling that the failure of the Commonwealth to provide counsel to the petitioners warranted the exercise of the Supreme Judicial Court's inherent and superintendence powers, and a declaration that trial judges had the authority, where necessary to ensure that an indigent defendant was not left to languish without counsel, to order that assigned counsel be compensated at a higher rate than what has been authorized by the Legislature (R. 29-30, 631-632). In the alternative, the petitions requested that this Court determine a fair rate of compensation for assigned counsel, and direct CPCS to begin paying assigned private counsel according to that rate or rates (R. 30).

The Single Justice held a hearing on the petitions on May 6, 2004 (R. 18, 25). On May 17, 2004, the Attorney General moved on behalf of the respondent Justices of the Springfield and Holyoke District Courts to dismiss the petitions (R. 19, 25, 152). On May 20, 2004, the petitioners filed an opposition to the motion to dismiss (R. 203-231) and further moved for immediate relief as to those petitioners who had been detained without counsel for more than two weeks (R. 201-202, 278-279). On May 21, 2004, the petitioners in Lavallee moved to amend their petition to name additional unrepresented indigent

defendants in Hampden County as petitioners,<sup>5/</sup> and to name the justices of additional Hampden County courts as respondents<sup>6/</sup> (R. 19, 280-318).

The Single Justice allowed the motion to amend on May 24, 2004 (R. 19), and, during a telephone conference held the next day (May 25, 2004), informed the parties that the cases would be reserved and reported to the full Court with an order for expedited briefing and oral argument (R. 20, 25). The reservation and report issued on June 2, 2004, and the consolidated cases were entered in this Court on the same date (R. 20, 26, 1165-1169). No action has been taken on respondents' motion to dismiss or on petitioners' motions for preliminary relief (R. 1166-1167).

STATEMENT OF REQUEST FOR PRELIMINARY RELIEF

- Our system for providing lawyers to indigent persons entitled to counsel in Massachusetts is failing. That failure has resulted in a constitutional crisis in

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<sup>5/</sup>James Yates, Jesus Gonzalez, Albert J. Fulton, III, George Arroyo, Eric Daniels, Rafael Mestre, Jr., John Carter, Abigail Velez, Luciano Claudio, Jr., Willie Middlebrooks, Alban Medina, Roberto Echevarria, Tina Welch, Cory Phillips, Julio Morales, Leo Freeman, Serafin Melendez, Vernon Holmes, Miguel Rivera, Gregorio Garcia, Jorge L. Garcia, Abraham Muniz, Thiago Barros, Tawanda Knighton, Philip Langley, Patrick Bass, Tami Przybycies, Nelson Dinzey, Alexander Perez, Lisa Quinn, Christopher Medina, Marco Sostre, and Racqual Garcia.

<sup>6/</sup>The Justices of the Hampden Superior Court, the Justices of the Chicopee District Court, the Justices of the Palmer District Court, and the Justices of the Westfield District Court.

Hampden County where, on a regular basis, men and women accused of crimes are brought from the county jail to the courthouse only to be returned without having been heard because, as stated by the Single Justice in his reservation and report, "assigned counsel is not available" (R. 1165).

- The cause of the crisis is undisputed. Compensation rates are shockingly low. Those rates -- \$30 per hour for a District Court case and \$39 per hour for a Superior Court case -- have remained essentially unchanged for nearly a generation and are now among the lowest in the nation. Over the past two years in Hampden County alone, approximately fifty bar advocate attorneys have stopped accepting assignments in indigent defense cases because they can no longer afford to do so. As a result, there simply are no longer enough lawyers available to satisfy the Commonwealth's constitutional obligation to provide competent counsel to all of those persons in Hampden County entitled to the assistance of counsel.

- The record shows that every conceivable effort has been made to obtain relief through the political process. There has been a near total failure on the part of the elected branches to act constructively since 1984. This failure has brought the system to its knees and, in doing so, has abrogated petitioners' basic right to be heard in court with the assistance of counsel. There is a present and continuing violation of fundamental rights which only this Court can address. Accordingly, peti-

tioners request a preliminary injunction authorizing payment of assigned counsel in the Hampden County courts at a rate of \$60 per hour for a District Court case and \$90 per hour for a Superior Court case.<sup>7/</sup>

STATEMENT OF FACTS

A. The role of the Supreme Judicial Court in creating a state agency for the provision of public counsel.

Until 1984, trial judges bore primary responsibility for assigning lawyers to represent indigent persons entitled to counsel in Massachusetts.<sup>8/</sup> Although a number of counsel-providing entities existed, including the Massachusetts Defenders Committee, the Roxbury Defenders Committee, and county bar association programs, the assignment of counsel was a judicial function.<sup>9/</sup> Outside of Suffolk County, representation of the indigent was provided mostly through county bar association programs, "which paid their attorneys on a per diem basis (\$100-\$150 per day, regardless of the number of cases)."<sup>10/</sup>

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<sup>7/</sup>Petitioners' requested compensation rates are the same as those approved by CPCS in 2002 pursuant to G.L. c.211D, §11. See nn.32, 61, post, and accompanying text. See also n.94, post.

<sup>8/</sup>See Rule 10 of the General Rules, 337 Mass. 813 (1958) (now S.J.C. Rule 3:10) (cited and discussed in Commonwealth v. Rainwater, 425 Mass. 540, 554 [1997]).

<sup>9/</sup>Arnold R. Rosenfeld, The Right to Counsel and Provision of Counsel for Indigents in Massachusetts: The Hennessey Era, 74 Mass. L. Rev. 148, 149-150 (1989) ("Special Issue: A Tribute to Edward F. Hennessey").

<sup>10/</sup>Id. at 150. In 1979, with the passage of the Court Reorganization Act, St. 1978, c.478, §110, payment for  
(CONTINUED ON NEXT PAGE)



Chief Justice Hennessey recognized that this balkanized system suffered from the "inherent conflict of judges assigning counsel directly" to indigents, and "lacked the central administration component necessary to manage a coordinated program."<sup>11/</sup> Accordingly, he appointed then-Associate Justice Wilkins to chair a Committee on the Appointment of Competent Counsel for Indigent Defendants in the District and Municipal Courts.<sup>12/</sup> By 1979, the Supreme Judicial Court had adopted the Wilkins Committee's recommendations for providing competent representation. Moreover, the Court itself "set new hourly fees at \$25 per hour for out-of-court time and \$35 per hour for in-court time spent on cases appealed to the jury of six and in the superior court."<sup>13/</sup>

Recognizing that the indigent defense system was in need of statewide reform, Chief Justice Hennessey "went to the Legislature to personally support legislative proposals for a centrally administered and financed system, within the judicial branch but independent from the Court."<sup>14/</sup> The resulting legislation, St. 1983, c.673, §1

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<sup>10/</sup> (CONTINUED FROM PREVIOUS PAGE)

court appointed counsel became the responsibility of the Chief Administrative Justice of the Trial Court.

<sup>11/</sup> Id. at 151.

<sup>12/</sup> Id. at 149.

<sup>13/</sup> Id. at 150. Although these rates purported to apply statewide, in practice their implementation was largely confined to Suffolk County.

<sup>14/</sup> Ibid.

(enacting G.L. c.211D, §1 et seq.) established a statewide indigent defense system, the Committee for Public Counsel Services, whose "structure, overall design, and policies" have since been recognized by national experts to be among the most advanced in the nation.<sup>15/</sup>

At its core, G.L. c.211D, requires that CPCS

shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency.<sup>16/</sup>

Notwithstanding the mandatory nature of this broad legislative directive, the ability of CPCS to pay for the professional services performed by the private attorneys who provide representation in over ninety percent of the nearly 250,000 cases assigned by CPCS every year<sup>17/</sup> is controlled by the Legislature: Pursuant to G.L. c.211D, §11, CPCS "shall establish" rates of compensation payable to private counsel, with the proviso that such compen-

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<sup>15/</sup>Norman Lefstein, In Search of Gideon's Promise: Lessons from England and the Need for Federal Help, 55 Hastings L.J. 835, 908 (2004). Professor Lefstein's article is scheduled for publication in June. The page citation here is from the final galley, a copy of which is filed with counsel.

<sup>16/</sup>G.L. c.211D, §5 (emphasis supplied).

<sup>17/</sup>R. 563 ("Five Year Trend -- Number of Private Attorneys vs. Total Active Cases, FY1999-2003").

sation is "subject to appropriation."<sup>18/</sup> The historical failure to appropriate sufficient funds for CPCS to carry out its section five mandate is at the center of the constitutional crisis at issue in the cases now before the Court.

B. The historical failure adequately to fund the right to the assistance of counsel in Massachusetts

Prior to the enactment of G.L. c.211D, assigned counsel in every county but Suffolk County was compensated not on an hourly basis but at a flat per diem rate, which remained the same regardless of the amount of work performed or the number of cases accepted.<sup>19/</sup> In a statewide evaluation of the bar advocate programs conducted in 1986 by the National Legal Aid and Defender Association, per diem rates were "thoroughly discredited" on the grounds that they created a "'disincentive for thorough prepara-

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<sup>18/</sup>G.L. c.211D, §11, provides:

The committee shall establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division in accordance with the provisions of paragraph (b) of section six. Such rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. Such periodic review shall take place not less than once every two years.

<sup>19/</sup>R. 577 (Report to the Legislature on the Committee for Public Counsel Services at ¶(h)).

tion and aggressive defense advocacy'" by assigned counsel.<sup>20/</sup> In response to this criticism, flat rates were abolished, and hourly compensation rates have been in effect statewide ever since.<sup>21/</sup> Since 1986, however, the compensation rates set by the Legislature have barely changed, and are now among the lowest in the nation.<sup>22/</sup>

Assigned Counsel Compensation Rates for Criminal Cases

Year	1986	2004
District Court	\$25 per hour in-court \$35 per hour out-of-court	\$30 per hour
Superior Court	\$25 per hour in-court \$35 per hour out-of-court	\$39 per hour
Murder Cases	\$50 per hour	\$54 per hour

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<sup>20/</sup>Ibid. (quoting NLADA report).

<sup>21/</sup>Ibid.

<sup>22/</sup>R. 415 (CPCS Assigned Counsel Hourly Rate History, 1986-2001); R. 241-249 (The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview (July 2002)).

In 1994, CPCS adopted the recommendation of its Budget and Fiscal Subcommittee to eliminate the discrepancy between in-court and out-of-court services and to raise its authorized rates to \$50 per hour for civil, juvenile, and district court cases, to \$65 per hour for superior court cases, and to \$85 per hour for murder cases.<sup>23/</sup> In the same year, the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation issued a comprehensive report, Striking a Balance: Adequate Compensation -- Effective Representation, which concluded "that the inadequate funding of our indigent defense program has clearly reached the crisis level and drastically impedes the implementation of the Sixth Amendment rights to counsel and to a fair and speedy trial."<sup>24/</sup> The Commission found that "by every relevant statistical comparison the present levels of compensation paid to attorneys who work in the [C]ommonwealth's criminal justice system are inadequate and inequitable."<sup>25/</sup> The Commission recommended that

compensation of bar advocate attorneys should be increased ... to \$50 per hour for all district court criminal matters including juvenile, \$65 per hour for all Superior Court matters and juvenile court transfers (except murder) and for appeals and \$85 per hour for all murder cases and murder appeals; bar advocate attorneys' hourly rate should be reviewed every two years

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<sup>23/</sup>R. 326 at ¶2 (Aff. of William J. Leahy, 5/28/04).

<sup>24/</sup>R. 364.

<sup>25/</sup>R. 368.

and periodically increased as appropriate.<sup>26/</sup>

From 1994 to 1999, "[e]very CPCS budget proposal ... included a request for an appropriation sufficient to raise the hourly rates to the ... levels" established by CPCS pursuant to G.L. c.211D, §11.<sup>27/</sup> Although it has made minor adjustments since 1994,<sup>28/</sup> the Legislature has never funded the rates established by CPCS. Indeed, requests for even the most modest increases were rejected by the Legislature.<sup>29/</sup>

In 2002, CPCS, pursuant to its statutory obligation under G.L. c.211D, §11, conducted a comprehensive review of the rates of compensation for appointed counsel. CPCS held eight public hearings in locations throughout the

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<sup>26/</sup>R. 370.

<sup>27/</sup>R. 375 (Statement of William J. Leahy in Support of HB 2741, 4/6/99).

<sup>28/</sup>The FY1996 budget changed the rate for District and Superior Court criminal and Juvenile Court delinquency cases from \$25 per hour for in-court services and \$35 per hour for out-of-court services to \$30 per hour for all services, and increased the rate for murder cases from \$50 to \$54 per hour. The FY1997 budget increased the rate for Superior Court criminal cases from \$30 to \$39 per hour (R. 327 at ¶4 [Aff. of William J. Leahy 5/28/04]).

<sup>29/</sup>In its FY2001 budget recommendation, CPCS proposed increases of \$10 per hour for murder cases, and \$7 per hour, to be phased in over three years, for all other cases (R. 386, 390, 589-590 at ¶¶6-7 [Aff. of Willie J. Davis, 5/28/04]). CPCS's proposal was approved by the House of Representatives but died in the budget conference committee. CPCS unsuccessfully sought similar incremental increases in its FY2002, FY2003, and FY2004 budget proposals (R. 408, 425, 444).

Commonwealth during 1998, 2000, and 2002.<sup>30/</sup> Informed by the evidence received at those hearings, and by its review of a national survey of assigned counsel compensation rates prepared by the Spangenberg Group in July, 2002,<sup>31/</sup> CPCS adopted the recommendation of its Compensation Subcommittee in December, 2002, to establish compensation rates pursuant to G.L. c.211D, §11, of \$60 per hour for District Court cases, \$90 per hour for Superior Court cases, and \$120 per hour for murder cases.<sup>32/</sup>

CPCS presented its revised compensation rates to the Joint Committees on Ways and Means in March, 2003. The Joint Committees were informed that compensation rates in Massachusetts were "among the lowest in the nation," and were especially inadequate "relative to [compensation rates in] comparable jurisdictions."<sup>33/</sup> It was emphasized to the Joint Committee that "[i]t is not the cost of each case, but the increasing number of cases, which drives CPCS costs, and which must be confronted if costs are to

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<sup>30/</sup>R. 588-589 at ¶4 (Aff. of Willie J. Davis, 5/28/04).

<sup>31/</sup>R. 241-249 (The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview (July 2002)).

<sup>32/</sup>R. 233 at ¶10 (Aff. of William J. Leahy, 5/20/04); R. 590-591 at ¶¶9-11 (Aff. of Willie J. Davis, 5/28/04).

<sup>33/</sup>R. 442 (Remarks of Chief Counsel Leahy before the Joint House and Senate Ways and Means Committee, 3/18/03). See also "Hourly Rate Comparison -- Assigned Private Counsel" (R. 452).

be controlled."<sup>34/</sup> The Joint Committee was told that CPCS received nearly 25,000 more new case assignments in FY2002 than it had received in FY1996.<sup>35/</sup> Notwithstanding this

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<sup>34/</sup>R. 442 (Remarks of Chief Counsel Leahy before the Joint House and Senate Ways and Means Committee, 3/18/03) (emphasis in original).

<sup>35/</sup>R. 442 (Remarks of Chief Counsel Leahy before the Joint House and Senate Ways and Means Committee, 3/18/03). The large number of cases for which CPCS bears assignment responsibility is a function of the breadth of the right to counsel under Massachusetts law. A recently-completed study with direct relevance to the current crisis underscores the fact that child care and protection and parental rights matters constitute "the fastest growing group of cases of all those requiring the appointment of counsel" to indigents in Massachusetts (R. 465 [The Spangenberg Group, Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis (10/20/03)]). CPCS also has "extensive responsibility" for assigning counsel in mental health commitment proceedings (R. 529 [Testimony of William J. Leahy at the ABA Hearing on the Right to Counsel 40 Years After Gideon, 11/13/03]), and other non-criminal matters, which collectively comprise about one-fifth of CPCS case assignments (R. 569 at ¶(c)(1)), and a significantly higher share of its private counsel costs (R. 571 at ¶(f) [FY2004 Report to the Legislature]). See also Rosenfeld, supra, The Right to Counsel and Provision of Counsel for Indigents in Massachusetts, 74 Mass. L. Rev. at 151 (describing common law expansion of the right to counsel in non-criminal matters in Massachusetts). In recent years, the Legislature has further expanded public counsel requirements in civil matters before the Sex Offender Registration Board, G.L. c.211D, §16, added by St. 1999, c.74, §10 (requiring that CPCS "shall establish, supervise and maintain a system for the appointment of counsel for the provision of legal services for indigents subject to the sex offender registry classification system and resulting appeals pursuant to" G.L. c.6, §§178C through 178P, inclusive), and in SDP proceedings, G.L. c.123A, §14(b), enacted by St. 1999, c.74, §8 (stating that a respondent to an SDP petition "shall be entitled to the assistance of counsel and shall be entitled to have counsel appointed if he is indigent"). The steady rise in the number of CPCS case assignment is attributable as well to the steady enactment of new criminal offenses, enhanced penalties for existing offenses, and other aggressive law

(CONTINUED ON NEXT PAGE)



information, the Legislature declined to adjust the compensation rates in FY2004.

At the hearings on the FY2005 budget, the Joint Committees were warned that immediate action was required. By this time, CPCS's budget for staff and operations had been reduced for three straight years, and over 200 experienced private attorneys had left the bar advocate program due to inadequate rates.<sup>36/</sup> Testimony before the Joint Committees made clear that years of underfunding had brought the system "to crisis in [w]estern Massachusetts and to the brink of crisis statewide."<sup>37/</sup> Notwithstanding these warnings, the budgets passed by the General Court this year provide, once again, that "the rates of compensation paid for private counsel services ... shall be the same as the rates paid" in the preceding fiscal year.<sup>38/</sup>

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<sup>35/</sup> (CONTINUED FROM PREVIOUS PAGE)  
enforcement initiatives (R. 574 [Report to the Legislature on the Committee for Public Counsel Services, 2/3/03]) (specifying seven criminal law enactments in FY2003 alone, each entailing additional costs and case assignment responsibilities for CPCS, and noting that the number of probation surrender assignments "has skyrocketed in recent years").

<sup>36/</sup>R. 555 (Remarks by Chief Counsel Leahy before the Joint House and Senate Ways and Means Committee, 2/24/04).

<sup>37/</sup>R. 555 (Remarks by Chief Counsel Leahy before the Joint House and Senate Ways and Means Committee, 2/24/04).

<sup>38/</sup>HB 4601, §2, line item 0321-1510. SB 2401, §2, line item 032-1510. This year's budgets propose a new "Salary Enhancement Trust Fund," to be funded by a \$15 filing fee paid by non-law enforcement applicants for misdemeanor

In addition to its annual budget proposals, its support for specific bills in 1999 and 2004 that would have raised assigned counsel rates,<sup>39/</sup> and its emphasis in its 2003 and 2004 reports to the Legislature on the urgent need for immediate action,<sup>40/</sup> CPCS has sought to forestall the threat to the right to counsel resulting from Massachusetts' inadequate assigned counsel compensation rates in a variety of other ways. It has, with the cooperation of the judiciary, commissioned a major published analysis of the child welfare counsel crisis in

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<sup>38/</sup> (CONTINUED FROM PREVIOUS PAGE)

complaints, not to exceed \$12 million in any fiscal year, and to be expended by CPCS "solely [for the purpose of] hourly rate enhancements for private bar advocates for the indigent." HB 4601, §257; SB 2401, §23. The filing fee is the sole revenue-generating mechanism contained in the proposed legislation, and is likely to produce, at most, ten percent of the \$12 million authorized (R. 100). Thus, assuming it becomes law, the Trust Fund would offer assigned counsel hope for a raise of about fifty cents an hour.

Another bill, pending in the Senate, proposes to add \$1 million to CPCS's main administrative budget, with the intention that this money will be used by CPCS to "hire staff attorneys for assignment to localities where CPCS has had trouble finding private counsel to take cases" (Aff. of Matthew J. Gorzkowicz at ¶3 [6/9/04]) (see n.2, ante). At the same time, however, the Senate bill would "reduce the line item used to fund private bar advocates by" \$7 million. Ibid. Even assuming arquendo that \$1 million invested in hiring more Public Defender Division staff attorneys could produce a \$7 million savings in Private Counsel Division assigned counsel fees, the proposed legislation does not materially increase the number of attorneys available to represent indigent defendants in Hampden County.

<sup>39/</sup>R. 374-375, 533-536.

<sup>40/</sup>R. 568-578.

four western Massachusetts counties.<sup>41/</sup> It has sought to inform the public of the consequences of continued underfunding of the right to counsel.<sup>42/</sup> It has attempted to alert judges, legislators, and other public officials to the counsel shortage in Hampden County, and to elicit their cooperation in addressing the systemic causes of that shortage.<sup>43/</sup> And it has sought to rebut the notion that "reforms" recently proposed by the Governor can ameliorate the need for increased fiscal support of the right to counsel.<sup>44/</sup>

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<sup>41/</sup>R. 331 at ¶7 (Aff. of William J. Leahy 5/28/04); R. 456-528 [The Spangenberg Group, Western Massachusetts Child Welfare Cases: The Court-Appointed Counsel System in Crisis, 10/20/03).

<sup>42/</sup>R. 428 (William J. Leahy, "Stiffing of Legal Aid Undermines Justice," Boston Herald, 2/18/03); R. 429-430 (Remarks by William J. Leahy on the 40th Anniversary of Gideon v. Wainwright, "A Somber Birthday," 3/18/03); R. 240 (William J. Leahy, "State Pays Third-rate Wages to First-Rate Public Attorneys," Boston Herald, 4/11/04); R. 87 at ¶7 (Aff. of William J. Leahy, 5/6/04, referring to "Attorneys Shun Work for Public Over Fees," Boston Globe, 2/16/02 at B1).

<sup>43/</sup>R. 89-98 (Letter from William J. Leahy to Justices of the Hampden Superior Court, "Declaration of Counsel Emergency in Hampden County," 4/20/04); R. 100 (Letter from William J. Leahy to legislative leaders referencing the worsening situation in western Massachusetts, where "judges are issuing orders to ... CPCS to assign counsel, under threat of contempt, in cases where criminal defendants are languishing in jail without a lawyer," 5/3/04).

<sup>44/</sup>R. 537-542 (William J. Leahy, "Better Pay for Bar Advocates": A Rejoinder, Massachusetts Lawyers Weekly, 2/16/04); R. 579-585 (Can the System be Saved? Massachusetts Lawyers Weekly, 5/10/04).

C. The current crisis in Hampden County.

CPCS uses the services of approximately 2,500 private attorneys as well as its Public Defender Division staff attorneys to carry out its statutory responsibility to provide counsel on civil and criminal cases in Massachusetts.<sup>45/</sup> The number of staff attorneys has been reduced by budget cuts from approximately 130 attorneys three years ago to 109 lawyers today.<sup>46/</sup> The number of private attorneys willing to accept assignments declined by over 200 attorneys in the five years from FY1999 to FY2003.<sup>47/</sup> This year, there has been a further decline in the number of private attorneys available to take cases.<sup>48/</sup> Many of the private attorneys who continue to accept public counsel assignments have nonetheless reduced the number of cases they are willing to accept, particularly with respect to Superior Court cases.<sup>49/</sup>

At the assigned counsel rate compensation hearings held between 1998 and 2002 (two of which took place in Springfield), the primary reason identified for the decrease in the number of attorneys willing to accept any

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<sup>45/</sup>R. 104 at ¶3 (Aff. of Patricia A. Wynn, 5/5/04); R. 234-235 at ¶¶2-3 (Aff. of Andrew Silverman, 5/20/04).

<sup>46/</sup>R. 234-235 at ¶3 (Aff. of Andrew Silverman, 5/20/04).

<sup>47/</sup>R. 105 at ¶4 (Aff. of Patricia A. Wynn, 5/5/04).

<sup>48/</sup>R. 105 at ¶5 (Aff. of Patricia A. Wynn, 5/5/04).

<sup>49/</sup>R. 105 at ¶8 (Aff. of Patricia A. Wynn, 5/5/04); R. 111-112 at ¶7 (Aff. of Nancy T. Bennett, 5/5/04).

appointments in CPCS cases, as well as for the reduction in the number of CPCS cases that bar advocates who have remained on the list are willing to accept, is the low compensation rates that CPCS is authorized to pay.<sup>50/</sup> Testimony at these hearings was insistent "that rates of compensation were too low to cover the attorneys' costs of operating a law practice and earning a living. Many attorneys stated that the rates were so inadequate that, unless they were substantially increased, the attorneys would have to leave the CPCS lists entirely, or limit their acceptance of assigned cases to only a few."<sup>51/</sup> At the 2002 hearings, held in Springfield on October 23, in Taunton on November 6, and in Boston on November 18, there was a uniform message delivered that "experienced attorneys were increasingly declining to accept CPCS assignments, due to inadequate compensation."<sup>52/</sup>

The decrease in the number of private attorneys willing to take CPCS cases, as well as the reduction in the number of CPCS cases which participating attorneys will accept, has been a significant problem in Hampden

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<sup>50/</sup>R. 588 at ¶4 (Aff. of Willie J. Davis, 5/28/04).

<sup>51/</sup>R. 589 at ¶5 (Aff. of Willie J. Davis, 5/28/04).

<sup>52/</sup>R. 591 at ¶11 (Aff. of Willie J. Davis, 5/28/04). See also R. 105 at ¶9 (Aff. of Patricia A. Wynn, 5/5/04 [attorneys state CPCS rates are too low to meet overhead]); R. 113 at ¶14 (Aff. of Nancy T. Bennett, 5/5/04 [noting near unanimity with which private counsel declining Superior Court assignments in Hampden County stated that compensation rates caused "significant financial loss"]).

County. Anthony Bonavita, President of the Hampden County Bar Advocates, Inc. program (HCBA) since April, 2001, has "seen a serious decline in the number of lawyers who are willing to accept court appointed cases through" the program.<sup>53/</sup> "[A]pproximately fifty lawyers" have left HCBA in the last several years.<sup>54/</sup> Since July, 2003, HCBA has had "insufficient private counsel participation to assign duty attorneys to cover the courts."<sup>55/</sup> HCBA has experienced particular difficulty "finding lawyers willing to accept appointments on superior court felonies that originate in the outlying district courts" of Hampden County, including Holyoke, Chicopee, Palmer, and Westfield District Courts.<sup>56/</sup>

According to Anthony Bonavita, "the primary reason for the decline in participation in the bar advocate program is the low rate of compensation. The problem in attracting participating attorneys with our already low rate of compensation has been compounded by recent threats by the Governor and [L]egislature to reduce further the rates of compensation and by delays and uncertainties in

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<sup>53/</sup>R. 806 at ¶3 (Aff. of Anthony Bonavita, 4/29/04). See also R. 811 at ¶9 (Aff. of Christine Cosby, 4/30/04 [report by administrator of the HCBA program that a "substantial number of participating attorneys" have resigned from the panel "in recent years"]).

<sup>54/</sup>R. 806 at ¶3 (Aff. of Anthony Bonavita, 4/29/04).

<sup>55/</sup>R. 112 at ¶9 (Aff. of Nancy T. Bennett, 5/5/04). See also R. 806-807 at ¶¶3, 7 (Aff. of Anthony Bonavita, 4/29/04).

<sup>56/</sup>R. 810 at ¶¶3, 5 (Aff. of Christine Cosby, 4/30/04).

whether bills would be paid at the end of the fiscal years."<sup>57/</sup>

Within the past year, a number of experienced Hampden County attorneys, each of whom is certified to take Superior Court assignments from CPCS, have made the decision either to cut back on the number of such assignments or to stop accepting them entirely.<sup>58/</sup> The current rates of compensation paid by CPCS "are not commensurate with the high degree of skill and dedication necessary to properly defend someone on such serious matters,"<sup>59/</sup> and are "inadequate" to maintain an office and staff, pay for office equipment and other professional necessities, and still make a reasonable profit.<sup>60/</sup> Although the CPCS-authorized compensation rates of \$60 per hour for a District Court case and \$90 per hour for a Superior Court

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<sup>57/</sup>R. 806 at ¶5 (Aff. of Anthony Bonavita, 4/29/04). See also R. 590 at ¶8 (Aff. of Willie J. Davis, 5/28/04 [describing "fear and anger" among bar advocate attorneys generated by Governor Romney's veto, in July, 2003, of \$13 million appropriated by the Legislature for private counsel compensation in FY2004]).

<sup>58/</sup>See, e.g., R. 814 at ¶4 (Aff. of Bonnie G. Allen, 5/4/04); R. 812 at ¶4 (Aff. of William J. O'Neil, 5/4/04); R. 816 at ¶4 (Aff. of George M. Nassar); R. 808 at ¶4 (Aff. of Mark L. Hare).

<sup>59/</sup>R. 814 at ¶4 (Aff. of Bonnie G. Allen, 5/4/04); R. 812 at ¶4 (Aff. of William J. O'Neil, 5/4/04); R. 816 at ¶4 (Aff. of George M. Nassar); R. 808 at ¶4 (Aff. of Mark L. Hare).

<sup>60/</sup>R. 814 at ¶¶4-5 (Aff. of Bonnie G. Allen, 5/4/04); R. 812 at ¶¶4-5 (Aff. of William J. O'Neil, 5/4/04); R. 816 at ¶¶4-5 (Aff. of George M. Nassar); R. 808 at ¶¶4-5 (Aff. of Mark L. Hare).

case are less than is charged to private clients, attorneys would accept some CPCS cases if they were compensated at the \$60 and \$90 levels.<sup>61/</sup>

By February, 2004, with the number of available HCBA panel attorneys having dwindled to critically low levels, Judge Sweeney, sitting in the first session in Hampden Superior Court, began to serve the individuals who sit on CPCS's governing committee<sup>62/</sup> with orders to assign counsel to particular defendants brought into the Superior Court without counsel.<sup>63/</sup> Meanwhile, bar advocate attorneys electing to remain on the list were being asked to shoulder increasing numbers of assignments. On April 27, 2004, Attorney Timothy M. Farris, the Vice President of HCBA, was the lone bar advocate duty attorney in the arraignment session of the Springfield District Court.<sup>64/</sup> Attorney Farris was assigned thirty-seven new clients,

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<sup>61/</sup>R. 814-815 at ¶6 (Aff. of Bonnie G. Allen, 5/4/04); R. 813 at ¶6 (Aff. of William J. O'Neil, 5/4/04); R. 816-817 at ¶6 (Aff. of George M. Nassar); R. 808-809 at ¶6 (Aff. of Mark L. Hare).

<sup>62/</sup>See G.L. c.211D, §1 ("The committee shall consist of fifteen persons to be appointed for a term of three years by the justices of the supreme judicial court").

<sup>63/</sup>R. 315 (Order of Notice to Show Cause Re: Civil Contempt, issued by Judge Sweeney to the members of CPCS's board in Commonwealth v. James Yates, HDCR2004-00472, 5/21/04). See also CPCS's efforts to comply with Judge Sweeney's orders (R. 89, 95-96, 149-150 at ¶¶2-4 [Aff. of William J. Leahy, 5/13/04], 302-304, 591-592 at ¶¶12-15 [Aff. of Willie J. Davis, 5/28/04]).

<sup>64/</sup>R. 614-615 at ¶¶2-3, 7 (Aff. of Timothy M. Farris, 5/27/04).



some with multiple cases, on that one duty day.<sup>65/</sup> Having received such a large number of new cases, Attorney Farris reduced his availability for duty days during the month of May, 2004.<sup>66/</sup>

D. The abrogation of petitioners' right to counsel.

Lavallee. Courtroom one in Springfield District Court, where the right to counsel of the petitioners in Lavallee attached, is the "busiest District Court in the Commonwealth of Massachusetts."<sup>67/</sup> Judge Payne presided over courtroom one during the week that began on Monday, May 3, 2004. During the months prior to that date, it had become increasingly difficult for HCBA to find lawyers willing to cover the arraignment sessions.<sup>68/</sup> No bar advocates at all appeared in courtroom one to accept assignments on Monday or Tuesday.<sup>69/</sup> Defendants who attempted to speak on their own behalf when brought before

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<sup>65/</sup>R. 615 at ¶7 (Aff. of Timothy M. Farris, 5/27/04).

<sup>66/</sup>R. 615 at ¶8 (Aff. of Timothy M. Farris, 5/27/04).

<sup>67/</sup>R. 270 (transcript of proceedings before Judge Payne 5/5/04). See also Judge Koenigs' Report of Issue Pursuant to Mass. R. Crim. P. 34, in Commonwealth v. Langley, Chicopee District Court No. 0420 CR 828 (R. 312) (stating that lack of bar advocates at arraignment sessions "has repeatedly occurred on Mondays, a particularly busy day for Springfield District Court, the busiest District Court in the Commonwealth").

<sup>68/</sup>R. 112 at ¶¶8-11 (Aff. of Nancy T. Bennett, 5/5/04).

<sup>69/</sup>R. 270.

the court were advised by Judge Payne not to do so.<sup>20/</sup> Bail was set and bail status changed for unrepresented defendants.<sup>21/</sup> Attorney Carol Gray, a CPCS Public Defender Division staff attorney working in courtroom one, was ordered by Judge Teahan to stop helping unrepresented defendants assert their right to be heard with the assistance of counsel.<sup>22/</sup>

By Tuesday (May 4), Judge Payne had before him nineteen indigent defendants in custody and without counsel. The charges brought against these unrepresented defendants ran the gamut from relatively minor traffic-related offenses to serious felonies not within the final jurisdiction of the District Court.<sup>23/</sup> After consultation with his colleagues, Judge Payne had the clerk's office fax "NAC" (Notice of Assignment of Counsel) forms pertaining to each of these defendants to CPCS's Boston office, and notify CPCS that Judge Payne had assigned "William Joseph Leahy" (the CPCS Chief Counsel) to represent each defendant.<sup>24/</sup>

Having received these notices on Tuesday afternoon,

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<sup>20/</sup>R. 43 at ¶7 (Aff. of Attorney Carol Gray, 5/5/05).

<sup>21/</sup>R. 42 at ¶4 (Aff. of Attorney Carol Gray, 5/5/05).

<sup>22/</sup>R. 41, 45 at ¶¶2, 16 (Aff. of Attorney Carol Gray, 5/5/05).

<sup>23/</sup>R. 55-80.

<sup>24/</sup>R. 51 at ¶8 (Aff. of Andrew Silverman, 5/5/04); R. 55-80.

Leahy drove to Springfield District Court and appeared in courtroom one at the call of the list on Wednesday morning, May 5. Leahy emphasized to the Court that "[i]t has never been the aim of the Committee for Public Counsel Services to invoke litigation in order to enforce the right to counsel."<sup>75/</sup> He stated that he was not in attendance in order to provide individual representation to any of the nineteen defendants held without counsel.<sup>76/</sup> Instead, as to each defendant, Leahy filed and argued collectively motions to assign certified private counsel at a rate of compensation greater than that authorized by the Legislature, which the Court denied, ruling that it would "continue with the order appointing CPCS."<sup>77/</sup> Leahy's objections were noted.<sup>78/</sup>

Carabello. The five petitioners in Carabello are defendants whose cases are, or were, pending in Holyoke District Court. Counsel for indigent defendants in Holyoke District Court are exclusively provided through HCBA, which has contracted with CPCS to provide attorneys for indigent defendants in those Hampden County courts not covered by the Public Defender Division.<sup>79/</sup> The Public

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<sup>75/</sup>R. 255.

<sup>76/</sup>R. 262.

<sup>77/</sup>R. 81, 269-274. See also n.4, ante.

<sup>78/</sup>R. 274.

<sup>79/</sup>R. 143 at ¶2 (Aff. of Christine Cosby, 5/5/04).

Defender Division does not have sufficient staff to permit it to cover the Holyoke District Court. It does not and has not assigned staff attorneys to that court.<sup>80/</sup>

HCBA's previously-described difficulties finding attorneys willing to accept appointments in Superior Court felonies originating in the district courts outside of Springfield has been particularly acute with respect to Holyoke District Court, where delays as long as three months have occurred.<sup>81/</sup>

Petitioner Michael Carabello is twenty years old and a high school drop out.<sup>82/</sup> He faces serious charges, including armed assault within a dwelling and kidnaping, lodged against him in the Holyoke District Court on April 2, 2004.<sup>83/</sup> Brought into court from the county jail on that date, Caraballo was advised by the court that an attorney would assist him for purposes of "bail only," but would not represent him beyond that.<sup>84/</sup> Bail was set at \$100,000 cash or \$500,000 surety. Caraballo has been unrepresented since April 2 and has not had a bail

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<sup>80/</sup>R. 50 at ¶3 (Aff. of Andrew Silverman, 5/5/04).

<sup>81/</sup>R. 143 at ¶3 (Aff. of Christine Cosby, 5/5/04); R. 1158 at ¶¶3-5 (Aff. of Michael Carabello, 5/28/04).

<sup>82/</sup>R. 1158-1159 at ¶2 (Aff. of Michael Carabello 5/28/04).

<sup>83/</sup>R. 716.

<sup>84/</sup>R. 714 (Findings After Hearing on Defendant's Motion for Appointment of Counsel, Holyoke District Court No. 0417 CR 1333, 5/5/04) (Gordon, J.).

review.<sup>85/</sup> In his affidavit, he describes the denial of the right to be heard in court with the assistance of counsel as follows:

"I have been brought back to court on three or four occasions but each time the same thing happens. I sit in the lockup and am then brought into the courtroom and told that I will be remanded to the House of Correction. I have never had the opportunity to speak, nor has any lawyer spoken on my behalf.... If I had a lawyer, there are several things that I would want to tell him that I believe could prove my innocence.... Having been in jail this long without having the opportunity to have a lawyer working for me makes me feel like a hostage instead of someone charged with a crime."<sup>86/</sup>

#### ARGUMENT

##### I.

THE SUBSTANTIVE RIGHT TO BE HEARD WITH THE ASSISTANCE OF COUNSEL CONTINUALLY FROM ARRAIGNMENT THROUGH SENTENCING IS IRREPARABLY DAMAGED BY THE FAILURE OF THE COMMONWEALTH'S CRIMINAL JUSTICE SYSTEM TO ENSURE THAT COMPETENT COUNSEL IS APPOINTED AT PETITIONERS' FIRST APPEARANCE OR PROMPTLY THEREAFTER.

Chronic underfunding of the Commonwealth's indigent defense system has left CPCS unable effectively "to maintain a system for the appointment or assignment of counsel," as required by G.L. c.211D, §5. For petitioners, the lack of available lawyers translates into a daily violation of their fundamental right to be heard with the assistance of counsel. With no attorney available to represent them, no action has been taken on

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<sup>85/</sup>R. 1158-1159 at ¶2 (Aff. of Michael Carabello 5/28/04).

<sup>86/</sup>R. 1158-1159 at ¶¶1-9 (Aff. of Michael Carabello 5/28/04).

petitioners' cases. Those in custody remain in custody, for without representation no bail appeal can be taken. No plea discussions can be had, no witnesses interviewed, no investigation begun. In short, nothing can be done to address the issues of petitioners' confinement or to begin the preparation of their defense.

In its motion to dismiss to the single justice, the Attorney General asserts that the right to counsel "only applies if the defendant is subject to incarceration upon conviction, which has not happened in any of the petitioners' cases" (R. 159). This observation leads the Attorney General to the conclusion that no violation of the right to be heard with the assistance of counsel is cognizable by this Court unless and until persons such as petitioners have in fact been convicted after trial and sentenced to a period of incarceration without counsel (R. 159). The Attorney General's argument is irreconcilable with forty years of constitutional case law following Gideon, with professional standards for the representation of indigent persons by appointed counsel promulgated in order to give substantive meaning to the promise of Gideon, and with this Court's supervisory duty "to correct and prevent errors and abuses" occurring in the trial courts, G.L. c.211, §3, ¶1, and to "improve[] ... the administration of such courts, and ... secur[e] ... their proper and efficient administration." G.L. c.211, §3, ¶2.

- A. Gideon requires that petitioners be represented by competent counsel from arraignment through sentencing.

The substantive right being violated in these cases is one that attaches at "the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment.... It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980), quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972). See Moran v. Burbine, 475 U.S. 412, 431 (1986) ("Sixth Amendment right to counsel ... attache[s] ... after the initiation of formal charges"); Commonwealth v. Patterson, 432 Mass. 767, 776 n.10 (2000) ("The defendant's Sixth Amendment and art. 12 rights to the effective assistance of counsel did not attach until ... arraignment").

Moreover, the plain wording of the Sixth Amendment is not restricted to trial but rather "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" United States v. Wade, 388 U.S. 218, 225 (1967) (quoting Sixth Amendment). The right announced in Gideon "cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." Maine v. Moulton, 474 U.S. 159, 170 (1985). The right to counsel thus extends to "all

critical stages of the proceedings," Iowa v. Tovar, 124 S.Ct. 1379, 1383 (2004), from arraignment, Kirby v. Illinois, 406 U.S. 682, 689 (1972), through sentencing. Mempha v. Rhay, 389 U.S. 128 (1967).

But the "right to counsel is not satisfied by the mere presence of a competent attorney [even at every critical stage of the proceedings] if that attorney is not prepared." Commonwealth v. Cavanaugh, 371 Mass. 46, 57 (1976). The "fundamental" nature of the right at issue necessarily encompasses a right to continual representation after arraignment by a lawyer who conducts an "adequate investigation" of the case prior to trial, Commonwealth v. Staines, 441 Mass. 521, 530 (2004), citing Commonwealth v. Roberio, 428 Mass. 278, 279-280 (1998), who litigates all viable pretrial suppression motions, Commonwealth v. Comita, 441 Mass. 86, 90 (2004), who has a "satisfactory discussion with [the accused] about the options realistically available to him," Commonwealth v. Fernandes, 390 Mass. 714, 718 (1984), and who otherwise acts to protect the defendant's substantial rights and interests prior to trial. "[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, supra, 388 U.S. at 224. Therefore, "the accused is guaranteed that he need not stand alone against the State



at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Id. at 226.

The right to counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial," Commonwealth v. Manning, 373 Mass. 438, 443 (1977) (internal citations omitted), because it "is a right upon which the essential element of fairness in the administration of justice depends." Guerin v. Commonwealth, 339 Mass. 731, 734 (1959). Accordingly, this Court has "repeatedly" made clear that the right announced in Gideon is "independently guaranteed by art. 12." Commonwealth v. Rainwater, 425 Mass. 540, 553 (1997) (internal citation omitted). In this Commonwealth, "[w]e do not expect inexperienced, unrepresented criminal defendants to understand court procedures or to know how to go about pressing their case through the criminal justice system." Commonwealth v. Lasher, 428 Mass. 202, 204 (1998) (internal brackets and quotation omitted). See Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (mere "presence of a lawyer of the Massachusetts Defenders Committee other than the defendant's appointed attorney did not satisfy" defendant's right to counsel at sentencing: "The assistance of a lawyer who could know almost nothing about the case ... is not the benefit of counsel to which the defendant is entitled").

- B. Professional standards promulgated after Gideon contemplate that counsel appointed at arraignment begins working immediately to ensure that the defendant may be heard fairly in court.

The organized bar has devoted considerable effort over the past forty years to devising professional standards intended to give meaning to the substantive right to counsel announced in Gideon. Those standards are "designed not only to guide attorneys but also to assist state criminal justice policymakers improve defense services," Lefstein, In Search of Gideon's Promise, *supra*, 55 Hastings L.J. at 906, and make clear that the indigent defendant is to be provided, at arraignment, with competent counsel who immediately begins working on a variety of important and time-sensitive tasks.<sup>87/</sup>

Long before the date set for trial, the practical realities of defense practice require that counsel conduct an intensive factual investigation to locate and preserve exculpatory evidence, serve as the defendant's representative and intermediary in responding to police or prosecution requests to question the defendant, and represent

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<sup>87/</sup>See, e.g., American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function (3d ed. 1993); National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation (1995); Committee for Public Counsel Services, Performance Guidelines Governing Representation of Indigents in Criminal Cases, at 4-1 to 4-28 in CPCS Assigned Counsel Manual (1999) (<http://www.mass.gov/cpcs/manuals/pcmanual/MANUALChap4Criminal.pdf>) (site visited June 11, 2004) (standards promulgated pursuant to G.L. c.211D, §9). See also Amsterdam, Trial Manual for Defense of Criminal Cases, §76 (4th ed. 1984); BNA Criminal Practice Manual (1992).

the defendant who is interested in exploring the possibility of a plea deal or defense cooperation in exchange for favorable treatment. Counsel must be present to protect the defendant's rights at any identification procedures, and is required to perform a range of legal research, including determining whether there are grounds for moving to suppress evidence or to dismiss the case, file pretrial motions, including discovery motions, participate in a pretrial conference with the prosecutor, conduct evidentiary motions hearings and, in appropriate instances, pursue interlocutory appellate relief.

In short, there are myriad responsibilities that counsel must undertake upon assignment, and which must be completed long before a trial on the merits commences, if the defendant is to benefit meaningfully from the substantive right announced in Gideon:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963)

(emphasis added), quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

## II.

PRELIMINARY RELIEF IS REQUIRED IN ORDER TO RESTORE ACCESS TO JUSTICE IN HAMPDEN COUNTY AND SAFEGUARD THE RIGHT OF INDIGENT DEFENDANTS TO THE ASSISTANCE OF COUNSEL.

### A. Summary.

Representation of indigent criminal defendants in Massachusetts is unequally divided between staff attorneys employed by CPCS's Public Defender Division and attorneys in private practice who agree to accept appointments through county bar advocate programs that have entered into contracts with CPCS.<sup>88/</sup> Over ninety percent of assigned counsel cases in the Commonwealth are handled by bar advocate attorneys, and this is where the system has broken down first. In absolute terms, assigned counsel compensation rates are barely higher today than they were 25 years ago, when this Court first established compensation rates, for counsel assigned to jury-of-six and Superior Court cases, at \$25 per hour for out-of-court work and \$35 per hour for in-court work.<sup>89/</sup> Since 1979, the elected branches of government have failed to ensure

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<sup>88/</sup> "[U]nder G.L. c.211D, §6(b), the contracting parties for private counsel services are CPCS and bar groups, not CPCS and the individual lawyers." Machado v. Committee for Public Counsel Services, 39 Mass. App. Ct. 178, 180, further appellate review denied, 421 Mass. 1104. (1995).

<sup>89/</sup> See n.13, ante, and accompanying text.

the adequacy of private counsel compensation rates. As a result, those rates are now among the lowest in the nation. This chronic failure to act has resulted in a steady reduction in the number of lawyers accepting assignments in indigent defense cases. Statewide, two hundred fewer private attorneys accepted CPCS assignments in FY2003 than had accepted such assignments in FY1999.<sup>20/</sup> In Hampden County, in the past two years alone, about fifty lawyers have left the bar advocate program simply because compensation rates are insufficient to permit participating attorneys to make a living.<sup>21/</sup> Moreover, the number of attorneys accepting assignments has been decreasing at the same time that the number of cases requiring the assignment of counsel has been increasing.<sup>22/</sup> As a result, there is no longer a sufficient number of lawyers available to satisfy the Commonwealth's obligation to provide competent counsel to all of those indigent persons entitled to be heard with the assistance of counsel. As the Governor's Chief Legal Counsel stated recently, "One point we've all agreed on ... is that our bar-advocate system is collapsing around our ears and likely will not sustain another fiscal year" (R. 584).

None of this can seriously be disputed. Indeed, the

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<sup>20/</sup>See n.47, ante, and accompanying text.

<sup>21/</sup>See nn.50-54, ante, and accompanying text.

<sup>22/</sup>See nn.17, 35, ante, and accompanying text.

Attorney General has not questioned the fact that compensation rates are inadequate, nor has he suggested that anything other than this inadequacy is the reason for the unavailability of assigned counsel in the instant cases. The Attorney General has, however, suggested that the crisis in Hampden County is merely a part of "a statewide problem calling for a statewide solution" (R. 168). Petitioners agree. The problems in Hampden County are not unique. They are, however, the most acute.

The Attorney General may be expected to advise the Court to deny petitioners' request for preliminary relief because there is legislation pending which may, in time, ameliorate the problem, if not statewide then perhaps at least in the western counties.<sup>23/</sup> But, even if enacted, any legislation the General Court may send to the Governor is incapable of providing any relief for those indigent defendants with pending cases who continue to be left without representation. There is a present and continuing violation of the substantive right to counsel, as guaranteed by art. 12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments to the United States Constitution, which this Court must address as a preliminary matter.

This Court has both the "imperative duty ... to say what the Constitution requires," Bates v. Director of the

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<sup>23/</sup>See n.38, ante.

Office of Campaign and Political Finance, 436 Mass. 144, 168 (2000) (internal citation omitted), and the "inherent common law and constitutional powers to supervise the administration of justice." Commonwealth v. O'Brien, 432 Mass. 578, 583 (2000). These powers may properly be exercised to require the expenditure of funds that the Legislature has failed to appropriate where, as here, the constitutional "question is properly presented," Bates v. Director of the Office of Campaign and Political Finance, supra, 436 Mass. at 168, and where, as here, the expenditure ordered is for "services" that are "necessary" for the judicial branch to carry out its core constitutional functions. O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 509, 510 (1972). See County of Barnstable v. Commonwealth, 422 Mass. 33, 45-46 (1996) (reaffirming Court's willingness to "intervene" by ordering expenditures not appropriated by the Legislature where it has been shown that such intervention is necessary to maintain "access to justice").

- B. Petitioners are entitled to a preliminary order that assigned counsel compensation rates in Hampden County immediately be raised on an interim basis to a level which ensures that petitioners and other indigent defendants do not continue to be deprived of their right to appear and be heard with the assistance of counsel.

Petitioners seek an order from this Court authorizing compensation of appointed counsel at a rate which is sufficient to ensure that competent counsel will be available

to represent them at the outset and at all subsequent stages of the criminal proceedings against them. The relief sought<sup>24/</sup> is limited to those Hampden County cases in which all reasonable efforts to obtain counsel for the defendants have been unavailing.

A request for preliminary relief in an action brought pursuant to G.L. c.211, §3, necessarily involves consideration of factors that parallel the standards for

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<sup>24/</sup>Petitioners seek a preliminary order for compensation rates of \$60 per hour for a District Court case, \$90 per hour for a case not within the final jurisdiction of the District Court, and \$120 per hour for a murder case. In moving for preliminary relief before the single justice, petitioners asked that the Hampden County trial courts be directed to conduct further hearings in petitioners' cases and, upon a finding that any indigent defendant had been held for two weeks or more without counsel, to assign counsel at a rate, not to exceed the rates approved by CPCS in 2002, that was sufficient to secure representation (R. 201-202, 278-279). As the matter is now before the full Court on reservation and report and a more complete record, petitioners ask this Court to establish appropriate interim rates for Hampden County. There is ample record support for petitioners' requested rates. They are the same as rates that were approved by CPCS in 2002 pursuant to the requirements of G.L. c.211D, § 11, on the basis of substantial evidence presented to and considered by its Compensation Subcommittee. See nn.30-32, ante, and accompanying text. The requested rates, adjusted for inflation, are also consistent with those recommended by the Massachusetts Bar Association Commission on Criminal Justice Attorney Compensation in 1994. See nn.24-26, ante, and accompanying text. Further, the Court may take notice that the rate authorized by the Criminal Justice Act for appointed counsel in federal courts was increased in FY2002 to \$90 per hour, Pub.L. No. 107-77 (2001), and that a justice of the New York Supreme Court recently ordered the City of New York to pay assigned counsel at an interim rate of \$90 per hour. New York County Lawyers' Ass'n v. State of New York, 192 Misc.2d 424, 438, 745 N.Y.S. 2d 376, 389 (2002). Finally, there are attorneys willing to represent petitioners at the requested rates (R. 649-654).



granting a preliminary injunction under Mass. R. Civ. Pro. 65, 365 Mass. 832 (1974). To secure such an injunction, the moving party must show that "failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm." Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). The court must then evaluate (1) the plaintiff's claim that he will suffer irreparable harm if the injunction is denied; (2) the injury the defendant will suffer if the injunction is granted; (3) the likelihood of success on the merits; and (4) the nature of the public interest. Town of Brookline v. Goldstein, 388 Mass. 443, 447 (1983).

The injury to those individuals who are currently unrepresented is immediate and irreparable, and each has a strong likelihood of success on the merits. Some have been deprived of their liberty for substantial periods of time, as long as three months. Without counsel, they are without the ability, as a practical matter, to challenge the amount of their bail. Moreover, without the assistance of counsel, no steps have been taken during this period to prepare a defense, which, given the amount of time that has elapsed, may well have deprived them "of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

To be sure, claims of ineffective assistance of counsel are ordinarily resolved on a case-by-case basis and only after conviction. The petitioners in these

cases, however, are not asserting a claim of ineffective assistance of counsel. They simply seek enforcement of their right to be represented by counsel in the first instance. The "ineffective assistance" standard of Strickland v. Washington, 466 U.S. 668 (1984), for determining, after a conviction, whether a violation of the right to counsel requires a new trial is

inappropriate for a civil suit seeking prospective relief. The Sixth Amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the Sixth Amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief -- whether the defendant is entitled to have his or her conviction overturned -- rather than to the question of whether such a right exists and can be protected prospectively.

Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), vacated on other grounds sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).

Preliminary relief is required to prevent the impairment of the fundamental right to a fair trial. As one court has noted recently in this context, "[t]he purpose [of the assistance of counsel] is to ensure that the defendant has the assistance necessary to justify society's reliance on the outcome of the proceedings." New York County Lawyers' Ass'n v. State of New York, 192 Misc.2d 424, 430, 745 N.Y.S. 2d 376, 384 (2002). It is for this reason that core rights guaranteed by art. 12 and

the Sixth Amendment are particularly appropriate for protection under G.L. c.211, §3. See Smith v. Commonwealth, 420 Mass. 291, 295-298 (1995) (ordering change of venue prior to trial to preserve defendant's art. 12 right to trial by fair cross section of the community); Neverson v. Commonwealth, 406 Mass. 174, 175 (1989) (criminal defendant who raises a double jeopardy claim of substantial merit is entitled to review of the claim pursuant to G.L. c.211, §3, prior to retrial).

Even if the deprivation of the right to counsel were thought not yet to have occurred, the entry of prospective injunctive relief is still justified to prevent the threatened violation of a constitutional right. New York County Lawyers' Ass'n v. State of New York, supra, 192 Misc.2d at 432, 745 N.Y.S. at 385. See also Good v. Commissioner of Correction, 417 Mass. 329, 336 (1994) (prisoner need not wait until he suffers actual harms before asserting a claim under art. 26); Nicholson v. Williams, 203 F.Supp.2d 153, 240 (E.D.N.Y. 2002) (Weinstein, J.) ("where the state imposes systemic barriers to effective representation, prospective injunctive relief without individualized proof of injury is necessary and appropriate").

Consideration of the public interest strongly militates in favor of petitioners. The Commonwealth has a constitutional obligation to provide indigent defendants with counsel. Although primary responsibility for meeting

this obligation lies with the Legislature, that branch of government has consistently failed to appropriate sufficient funds necessary to ensure representation by counsel. At this point, there can be no realistic expectation that any forthcoming legislative action could be sufficiently timely to remedy the ongoing harm to petitioners resulting from years of legislative inaction. If the relief sought is not provided by this Court, it will not be forthcoming for petitioners at all.

Without counsel, petitioners and other indigent defendants in Hampden County are deprived of meaningful access to the courts. It is undisputed that this deprivation is the result of the inadequate compensation rates mandated by the Legislature. Failure of the legislative branch to provide funds necessary for this integral aspect of the judicial system requires immediate interim intervention by this Court.

C. This Court has the inherent authority to order the relief requested.

This Court's authority to order expenditure of unappropriated funds necessary to ensure that indigent defendants appearing in the courts of Hampden County may be heard with the assistance of counsel comes from two interrelated sources: The Court's inherent common law and constitutional powers of supervision of the judicial system, which may be exercised when "necessary to secure

the full and effective administration of justice," O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 514 (1972), and its duty, as the final arbiter of constitutional questions, to declare what the Constitution requires. Goodridge v. Department of Public Health, 440 Mass. 309, 338-339 (2003).

It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel. Such authority must be vested in the judiciary if the courts are to provide justice, and the people are to be secure in their rights, under the Constitution.

O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972).

"[A]mong the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel." Id. (emphasis added). A judge may therefore obligate the state to pay for those "expenses reasonably necessary for the operation of [the] court, and ... may issue an ex parte order for the payment of any obligation so incurred." Id. at 509. See Baird v. Attorney General, 371 Mass. 741, 762-764 (1977) (approving compensation without specific appropriation for counsel

appointed to represent an indigent minor "asserting a constitutional right to an abortion in a State-mandated civil proceeding").

The inherent authority of the judicial branch to require expenditures for resources reasonably necessary for its essential operation is but one aspect of this Court's "broader inherent common law and constitutional powers to supervise the administration of justice."

Commonwealth v. O'Brien, supra, 432 Mass. at 583. When acting in its supervisory role "in matters concerned with the administration of the courts and the trial of cases," this Court may legitimately "impose requirements (by order, rule or opinion) that go beyond constitutional mandates," and that are "not limited to correcting error, but may be guided by whatever is needed to ensure that cases are tried fairly and expeditiously." Id. at 584.<sup>95/</sup>

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<sup>95/</sup>The authority of the judiciary to order payment even in the absence of specific legislative appropriation was implicitly recognized in Abodeely v. County of Worcester, 352 Mass. 719, 723 (1967), where the Court, relying solely on the general language of G.L. c.213, §8, ordered the county to compensate appointed counsel in non-capital cases notwithstanding the fact that there was statutory authority only for the compensation of counsel in first degree murder or capital cases. The Court concluded that in order to "provide appropriate defence under the Constitution as it has been interpreted," appointed counsel should be paid from the county treasury. Id. at 723. G.L. c. 213, §8, as amended through St. 1978, c.478, §127, provides that "[t]he courts shall, respectively, receive, examine and allow accounts for services and expenses incident to their sittings and order payment thereof out of the state treasury." See also Pugliese v. Commonwealth, 335 Mass. 471 (1957); Brown v. Commonwealth.

The doctrine of inherent judicial power is widely recognized in American case law,<sup>95/</sup> and has been relied upon by courts in other jurisdictions to order compensation of appointed counsel that had not been legislatively authorized.<sup>97/</sup> Here too it is appropriate for the Court to exercise its inherent power to order the payment of a fee to appointed counsel in the Hampden County courts that is higher than what has been authorized by the

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<sup>95/</sup> (CONTINUED FROM PREVIOUS PAGE)

335 Mass. 476 (1957) (both holding on art. 12 grounds that special circumstances required special measures to provide indigent defendants with the assistance of counsel).

<sup>96/</sup> See, e.g., Pennsylvania State Association of County Commissioners v. Commonwealth of Pennsylvania, 545 Pa 324 (1996) (abolition of county funding of judicial system); Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978) (payment of witness fees); Judges for the Third Judicial Circuit v. County of Wayne, 15 Mich. App. 713 (1969) (hiring and payment of law clerks). See also Jeffrey Jackson, Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers, 52 Md. L. Rev. 217, 220, n.25-27 (1993).

<sup>97/</sup> See, e.g., State ex rel Friedrich v. Circuit Court for Dane County, 192 Wis.2d 1, 43 (1995) (clear and compelling need to award higher court approved rates in lieu of statutory rate); White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376, 1378 (Fla. 1989) (trial court may exercise inherent power to award fees in excess of statutory cap when limits "became so out of line with reality that they materially impair the abilities of officers of the courts to fulfill their roles of defending the indigent and curtail the inherent powers of the courts to appoint attorneys to those roles"); Smith v. State, 118 N.H. 764, 769 (1978) ("We view it implicit in the constitutional scheme that the courts of this State have the exclusive authority to determine the reasonableness of compensation for court-appointed counsel. The statutes [limiting compensation of counsel] intrude upon this judicial function in violation of the constitutional separation of powers mandate").

Legislature. "The invocation of th[e] doctrine [of inherent judicial power] is most compelling when the judicial function at issue is the safeguarding of fundamental rights.... [W]here fundamental rights are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements." Rose v. Palm Beach County, supra, 361 So.2d at 137.

Where, as here, the Legislature has failed to appropriate funds that are constitutionally necessary, "the judiciary has the power to order the provision of such funds, with or without legislative appropriation." County of Barnstable v. Commonwealth, 410 Mass. 326, 330 (1991).

Apart from its inherent authority, this Court has the responsibility, upon finding a constitutional violation, to fashion an appropriate remedy, which may include the ordering of expenditures that the Legislature has refused to appropriate. See Bates v. Director of the Office of Campaign and Political Finance, supra, 436 Mass. at 168, citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This Court has consistently rejected the argument that the lack of a specific appropriation justified a failure to correct unconstitutional conditions in state facilities. Thus, in Richardson v. Sheriff of Middlesex County, 407 Mass. 455 (1990), the Court rejected the Sheriff's argument that unconstitutional jail conditions were justified by the need to keep the jail open to house prisoners:



[T]he only conceivable purpose overcrowding ... serves is to further the state's interest in housing more prisoners without creating more prison space. This basically economic motive cannot lawfully excuse the imposition on the presumptively innocent [pretrial detainees] of genuine privations and hardship over any substantial period of time.... Indeed, we rejected a similar argument in Michaud v. Sheriff of Essex County, 390 Mass. 523, 532 (1983). There, ... we flatly reject[ed] the notion that an arm of the State may be allowed to violate an individual's constitutional rights because funds have not been appropriated to remedy the wrong.... [B]udgetary constraints ordinarily do not, in and of themselves, provide a legal excuse for noncompliance [with constitutional requirements].... We cannot permit unconstitutional conditions to exist simply because prison officials cannot ... spend the money necessary to fulfill constitutional requirements.

Id. at 466 (internal citations omitted).<sup>98/</sup> "[W]hen legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the constitution by order of a mandatory injunction." New

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<sup>98/</sup>See also McDuffy v. Secretary of Executive Office of Educ., 415 Mass. 545, 621 (1993) (state Constitution "impose[s] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.... [I]t is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate"); Moe v. Secretary of Admin. & Fin., 382 Mass. 629 (1981) (State's failure to fund medically necessary abortions, while funding all other medically necessary procedures invaded a woman's constitutional right of choice; state required to pay for medically necessary abortions).

York County Lawyers' Ass'n v. State of New York, supra, 192 Misc.2d at 436, 745 N.Y.S. at 388 (entering preliminary injunction which ordered the City of New York to pay assigned counsel an interim rate of \$90 per hour).

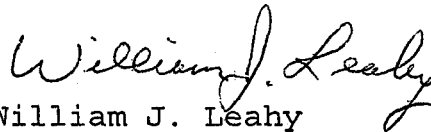
#### CONCLUSION

The Commonwealth of Massachusetts may justifiably take pride in having anticipated Gideon v. Wainwright by five years. In a prescient amicus brief submitted in support of the petitioner in Gideon, the Attorney General of Massachusetts acknowledged that a substantive right to counsel would not come cheaply, even as he reminded the Court that a correct constitutional ruling could not on that account be avoided: "[I]t will not be the first time that legislative action has become a necessary consequence of a decision of the Court." Brief for Amici Curiae, The State Governments of Twenty-two States and Commonwealths, filed by Edward J. McCormack, Jr., Attorney General of Massachusetts, at pp. 23-24, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

For the above-stated reasons, the Court should (a) deny respondents' motion to dismiss (b) enter a preliminary injunction directing the justices of the trial courts in Hampden County, pending further order of this Court, to authorize that compensation of certified private counsel be at a rate of \$60 per hour for a District Court

case, \$90 per hour for a case not within the final jurisdiction of the District Court, and \$120 for a murder case, and (c) remand these cases to the single justice for appropriate further proceedings.

Respectfully submitted,



John Reinstein  
BBO #416120

William J. Leahy  
BBO #290140

ACLU of Massachusetts  
99 Chauncey Street  
Suite 310  
Boston, MA 02111  
(617) 482-3170

Andrew Silverman  
BBO #462700

Patricia A. Wynn  
BBO #542523

William C. Newman  
BBO #370760

Benjamin H. Keehn  
BBO #542006

ACLU of Massachusetts  
39 Main Street  
Northampton, MA 01060  
(413) 584-7331

COMMITTEE FOR PUBLIC COUNSEL SERVICES  
44 Bromfield Street  
Boston, MA 02108  
(617) 482-6212

David P. Hoose  
BBO #239400  
KATZ, SASSON, HOOSE & TURNBULL  
1145 Main Street  
Suite 304  
Springfield, MA 01103  
(413) 732-1939

June, 2004.

**ADDENDUM**

**UNITED STATES CONSTITUTION**

**SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**FOURTEENTH AMENDMENT, SECTION ONE**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**MASSACHUSETTS DECLARATION OF RIGHTS**

**ARTICLE TWELVE**

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

## **MASSACHUSETTS GENERAL LAWS**

### **CHAPTER 211, SECTION THREE**

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent such action, there would be a severe and adverse impact on the administration of justice in the Commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

### **CHAPTER 211D, SECTION ONE**

There shall be a committee for public counsel services, hereinafter referred to as the committee, to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by all salaried public counsel, bar advocate and other assigned counsel programs, and private attorneys serving on a per case basis. The

committee shall consist of fifteen persons to be appointed for a term of three years by the justices of the supreme judicial court. Said court shall request and give appropriate consideration to nominees for the fifteen positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers. Each member of the committee shall serve until his successor in office has been appointed and qualified. Vacancies shall be filled by the justices of the supreme judicial court by appointment to an unexpired term. Members of the committee may be removed by the justices of the supreme judicial court. No member of the committee shall receive any compensation for his services, but each member shall be reimbursed for actual expenses incurred in attending the committee meetings.

The provisions of chapter two hundred and sixty-eight A shall apply to all members, officers and employees of the committee, except that the committee may provide representation or enter into a contract pursuant to the provisions of sections three or six although a member of the committee may have an interest or involvement in any such matter; provided, however, that such interest and involvement is disclosed in advance to the other members of the committee and recorded in the minutes of the committee; and provided, further, that no member having an interest or involvement in any contract under section three may participate in any particular matter, as defined in section one of chapter two hundred and sixty-eight A, relating to such contract.

## **CHAPTER 211D, SECTION TWO**

The committee for public counsel shall establish a definition of "indigency" for the purposes of this chapter and uniform standards and procedures for the determination by the courts of the commonwealth that (1) a person is indigent and is unable to obtain counsel or (2) said indigent person has the ability to pay a reduced fee for the appointment of counsel. Said definition and standards, and any amendments thereto, shall be subject to the approval of the supreme judicial court and shall be used by the courts of the commonwealth in determining assignment of cases to the committee pursuant to section five. In the formulation of said definition, standards, and procedures, the committee shall consider the reporting system operated by the commissioner of revenue for the purpose of verifying financial eligibility of participants in state or federally funded programs, and its potential applicability to the provision of legal services for indigent defendants. Payment of any reduced fee by an indigent person for the appointment of counsel shall

be made to the probation department of the appointing court, and shall be forwarded to the state treasurer who shall deposit such in the general fund.

#### **CHAPTER 211D, SECTION TWO AND ONE-HALF**

Notwithstanding any other law to the contrary, a criminal defendant seeking appointment of counsel shall execute an affidavit stating under the pains and penalties of perjury that he meets the definition of indigency promulgated under section 2. A criminal defendant claiming indigency shall also execute a waiver authorizing the court's chief probation officer to obtain the defendant's wage and tax information from the department of revenue and any relevant information from the department of transitional assistance that the court may find useful in verifying the defendant's claim of indigency.

#### **CHAPTER 211D, SECTION TWO A**

Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of a municipal ordinance or bylaw need not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Any person provided counsel under the provisions of this chapter shall be assessed a counsel fee of \$150, which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to section two and shall be collected in accordance with said section.

The department of revenue shall be authorized to intercept said fee from tax refunds due to persons who have not paid said fee.

The department of public welfare shall be authorized to deduct said fee in weekly or monthly increments from persons who have not paid said fee.

### **CHAPTER 211D, SECTION THREE**

Said committee may accept gifts, grants or contributions from any source, whether public or private, and may enter into contracts to provide or receive services with any federal, state, county or municipal entity, with any group or individual, whether profit or nonprofit, or with any nonprofit or voluntary charitable group, corporation, association or organization, including any bar association or bar advocate group.

### **CHAPTER 211D, SECTION FOUR**

Said committee shall adopt such rules and regulations as may be necessary for the conduct of its affairs and may from time to time amend or revise the same. The committee shall prepare an annual report which shall be a public document. The committee shall establish standards and guidelines for the training, qualification and removal of counsel in the public and private counsel divisions who accept its appointments, and shall provide pre-service and in-service training for both private counsel who accept assignments and salaried public counsel. The committee may establish a rotating appointment mechanism that will encourage open access among attorneys participating within the private counsel division.

### **CHAPTER 211D, SECTION FIVE**

Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency. The committee may also establish a system for the provision of counsel in any pre-arraignment procedure. A justice or associate justice shall assign a case to the committee, as hereafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as to the defendant's ability to pay for counsel, based on the standards and procedures provided for in section two.

### **CHAPTER 211D, SECTION SIX**

In carrying out its duties as prescribed in section five, the committee shall:

(a) Utilize its staff of attorneys, which shall be known hereafter as the "public defender division." Said division shall include a unit to be



known as the Roxbury defenders unit, which shall represent clients as assigned pursuant to this chapter in the Roxbury division of the district court department. Said division shall also include a unit to be known as the youth advocacy project. Said division shall be assigned to represent indigent defendants in all criminal cases, except that:

(i) said division shall not be assigned to represent more than one defendant in any matter before any court on the same case or arising out of the same incident;

(ii) said division shall not be assigned to represent a defendant in any case in which there is a conflict of interest with any of its clients;

(iii) said division shall not be assigned to a case where a person is before the probate and family court department or the housing court department for criminal contempt or in such other proceeding in said departments in which such person is entitled to be represented by counsel;

(iv) said division shall not be assigned to represent any child alleged to be delinquent, except in such cases which may result in exposure to adult incarceration or commitment to the department of youth services until the age of twenty-one, and except in cases charging delinquency by conduct which would be punishable by imprisonment in the state prison if committed by an adult and except in the Boston and Bristol county divisions of the juvenile court department or in the Roxbury division of the district court department. Private counsel who have been certified to accept assignments in such cases shall also be eligible to provide representation to persons thus charged.

(v) said division shall not be assigned to represent any person charged with a misdemeanor unless said misdemeanor is in conjunction with a felony charge for which said division has been assigned.

(b) Establish, supervise, and maintain a system for the appointment of private counsel, hereafter called the private counsel division which shall include a children and family law program and a mental health unit. The committee shall enter into contractual agreements with any state, county or local bar association or voluntary charitable group, corporation or association, including bar advocate groups, for the purpose of providing such counsel. Said committee may also contract with such other organized groups of attorneys as may be formed to afford representation to indigent defendants and may appoint and compensate private attorneys, on a case-by-case basis, as counsel for indigents entitled to representation. Neither individuals nor members nor participants in any group, corporation or association with whom the

committee may contract under this paragraph shall be considered to be or have any rights as state employees.

(i) Said division shall be assigned for all persons accused of crimes entitled to counsel who, through their inability to pay for counsel, must have counsel appointed to them, but who, pursuant to the provisions of subparagraph (a) of this section are not to be represented by the public counsel division.

(ii) Said division shall be assigned to represent a person who is before the probate and family court department or the housing court department in a criminal contempt proceeding or in such other proceeding in said departments in which a person is entitled to be represented by counsel.

(iii) Said division shall also be assigned to represent persons in such other proceedings as the chief counsel shall determine to be necessary

#### **CHAPTER 211D, SECTION SIX A**

In carrying out its duties as prescribed in sections 5 and 6, the committee shall, subject to appropriation, utilize its attorney staff within the private counsel division. The committee shall establish a children and family law program in the counties of Essex and Hampden which shall, upon the court's appointment, provide representation to indigent persons in children and family law cases. Nothing herein shall be construed to limit the system as established in sections 5 and 6 of this chapter, whereby the court appoints certified private counsel to represent children and parents in the majority of children and family law cases

#### **CHAPTER 211D, SECTION SEVEN**

Said divisions shall be assigned to represent persons charged in the district court department with concurrent felonies under section twenty-six of chapter two hundred and eighteen as further defined by the committee.

#### **CHAPTER 211D, SECTION EIGHT**

Upon a determination by a court that a person accused of murder in the first or second degree is indigent, the chief counsel or his designee may assign the case to either the public defender division or the private counsel division, subject to the approval of the justice making the determination of indigency.

## **CHAPTER 211D, SECTION NINE**

The committee shall establish standards for the public defender division and the private counsel division which shall include but not be limited to:

- (a) vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible;
- (b) required participation by each attorney in an approved course of training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such participation unnecessary;
- (c) specified caseload limitation levels;
- (d) investigative services;
- (e) a method for the provision of social services or social service referrals;
- (f) availability of expert witnesses to participating counsel;
- (g) clerical assistance, interview facilities, and the availability of a law library and model forms to participating counsel; and
- (h) adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.
- (i) qualifications for vendors for the services provided in clauses (d), (e) and (f) and a range of rates payable for said services, taking into consideration the rates, qualifications and history of performance; provided, however, that such ranges may be exceeded with approval of the court. Payment of such costs and fees shall be in accordance with the provisions of section twenty-seven A to G, inclusive, of chapter two hundred and sixty-one.

## **CHAPTER 211D, SECTION TEN**

The committee shall monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth and shall establish a procedure for the review and disposition of client complaints. The committee shall also establish procedures whereby comments on the standard of performance of

counsel in its divisions may be submitted by the justice hearing a particular matter.

#### **CHAPTER 211D, SECTION ELEVEN**

The committee shall establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division in accordance with the provisions of paragraph (b) of section six. Such rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. Such periodic review shall take place not less than once every two years.

#### **CHAPTER 211D, SECTION TWELVE**

The committee shall establish policies and procedures to provide fair compensation to private counsel, which shall include a remedy for an attorney aggrieved by the amount of payment. The committee shall also establish an audit and oversight department to monitor billing and private attorney compensation. All invoices shall be processed for payment within thirty days of receipt by the chief counsel. Bills shall be submitted to the committee within thirty days of the conclusion of a case; or, if the case is pending at the end of the fiscal year, within thirty days after the end of such fiscal year. The amount of payment for invoices received by the chief counsel more than thirty days after the final disposition of the case or more than thirty days after the end of the fiscal year shall be reduced by 10 percent. Bills submitted after such date need not be processed for payment within thirty days. The committee may further prescribe such policies and procedures for payment as it deems appropriate; provided, however, that the committee may impose interest and penalties, where appropriate, upon overpayment of the private attorney bills recovered from private attorneys.

#### **CHAPTER 211D, SECTION THIRTEEN**

The committee shall appoint a chief counsel, whose responsibilities and duties shall be defined by the committee and shall include, but not be limited to, the overall supervision of the workings of the various divisions of the committee. The committee shall further appoint two deputy chief counsel, with duties defined by the committee, one of

whom shall supervise the public defender division, and the other shall supervise the private counsel division. The committee shall also prescribe the procedures for the appointment of all legal and nonlegal staff of the public defender division and for the procurement of office space as may be required. The chief counsel shall authorize the certification of all payments under section twenty-seven G of chapter two hundred and sixty-one and section twenty of chapter twenty-nine. All legal and nonlegal staff of the public counsel division shall be full time and shall devote their entire time during ordinary business hours to their duties and shall neither directly or indirectly engage in the private practice of law. The chief counsel and deputy chief counsels shall likewise devote full time to their duties. The chief counsel, deputy chief counsels and all legal and non-legal staff of the committee, including staff attorneys hired under subparagraphs (a) and (b) of section 6 but not including persons described in the fourth sentence of said subparagraph (b) of said section 6, shall be considered public employees for purposes of chapter 258. The chief counsel shall be paid a salary comparable to the salary paid to a district attorney. The salaries of the deputy chief counsels shall be established by the committee. All other legal staff of the public defender division shall be paid at salaries comparable to the salary paid to an attorney employed in a district attorney's office.

The counsel and other employees appointed by the committee shall not be subject to the provisions of chapter thirty-one.

#### **CHAPTER 211D, SECTION FOURTEEN**

The public counsel division, except in cases of conflict of interest, shall represent indigent defendants in all appeals and related post-conviction remedies. In the case of a conflict of interest, the assignment shall be to the private counsel division.

#### **CHAPTER 211D, SECTION FIFTEEN**

The committee shall consult regularly with a community advisory board appointed by the committee to represent the greater Roxbury community. Members of the community advisory board shall not receive compensation or reimbursement for expenses.

NO. 09268

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NATHANIEL LAVALLEE, et al.

V.

THE JUSTICES OF THE HAMPDEN SUPERIOR COURT, et al.

MICHAEL CARABELLO, et al.

V.

THE JUSTICES OF THE HOLYOKE DISTRICT COURT

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ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

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